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No. 84.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

JOSEPH H. BEALS,
Plaintiff in Error,

v.

JAMES J. CONE, AND
LYMAN ROBISON,
Defendants in Error.

PETITION FOR A REHEARING.

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Attorney for Plaintiff in Error.

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Now comes the said plaintiff in error and petitions the court for a rehearing in said cause, for the reasons:

1. The court erred in holding that plaintiff in error, as to the contest before the Land Department, appeared as an *amicus curia* and not as a party.

2. The court erred in holding that none of the Federal questions discussed in oral and printed argument were sufficiently raised and relied upon in the lower court.

3. The court erred in holding that it has not jurisdiction and in dismissing the cause for want of jurisdiction.

I.

Upon the question of *res adjudicata* the court says that there is "no suggestion in the pleadings that the protestants *were in any way interested in the ground applied for.*" The complaint does distinctly show that plaintiff in error had a claim conflicting with the one being applied for, the location of which *ante dated the protest proceedings.* The record further shows that he was summoned before the land office to *produce evidence in support of his protest.* In other words he (and not the United States) was required to *prosecute these protest proceedings.* The record still further shows that he was accorded the right of an appeal, which is granted by the Land Department only to *parties interested.* These are some of the facts which we relied upon, in both oral and written argument, to sustain our contention that he appeared as an *interested party* and not as *amicus curia.* Not one of them has been alluded to. We think we are justly entitled to have these record facts, all of which are inconsistent with the conclusion of the court, duly considered.

If the court intends to hold that a protestant, under the Act of Congress, can never be anything

more than an *amicus curia* we are content. But if the court intends to hold that such protestant may sometimes be a party, with the ordinary rights of a party, depending upon the circumstances under which he appears, then we maintain that plaintiff in error was a party to the protest proceedings in question. We make this contention upon the record facts already alluded to.

(1) He had a conflicting claim at the time he filed his protest. The complaint, the original location certificate, and the testimony of Bridge and Hoenshell clearly shows that the claim involved in this cause was located in the spring of 1892. The protest was filed subsequent to January 10, 1893, the date of the mineral entry against which the same was made (Record, p. 162). The protestant was, therefore, interested to defeat the application for a patent. If the patent had issued his claim was gone. As the record clearly shows his interest, the *reasonable inference* is that the protest was filed to protect such interest, rather than as a "good citizen seeking to prevent a wrong upon the government."

(2) The protestant was treated as a party. A summons was served upon him which concluded as follows: "Now, therefore, the said parties are hereby summoned to appear at this office on October 11, 1893, at 9 o'clock A. M., to respond and *furnish testimony* concerning the said allegations." (Record, p. 165). By this summons the duty to prosecute these protest proceedings by *furnishing testimony* was distinctly devolved upon protestant. The fair inference is, and the truth was, that pro-

testant had to do this at his *own expense*. Was he doing this merely as a "good citizen" and not in his own interest?

(3) When the local land officers ruled against his protest, the protestant prayed and was allowed an appeal to the Commissioner of the General Land office. Did he pray for this appeal merely as a "good citizen?" If he had no motive except to perform a duty as a citizen, would he not have been content with the decision of the local land officers? But the allowance of the appeal was a *distinct and conclusive recognition* that the protestant was an *interested party*. This has been the uniform holding at the Land Department.

The court assumes that the application for a patent was a proceeding solely between the applicant and the United States. This view is *signally erroneous*. When the protest was filed a third party was introduced. The Act of Congress (R. S., section 2325) provides that if no adverse claim is filed it shall be assumed that the applicant is entitled to a patent, "*and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.*" By this act the failure to file an adverse claim does not exclude third parties in interest, but only restricts the scope of inquiry. The protestant, by virtue of this act, had a perfect right to protect his claim, by filing this protest. He could not have accomplished anything more by filing an adverse claim than he could by protest. The protestant had made no discovery, and hence he could have ac-

complished no more by an adverse suit, than to have secured an adjudication that neither party was, at that time, entitled to the property. This would have simply defeated the application for a patent—a result that was accomplished by the protest.

As none of the principal record facts which we relied on to show that the protestant was an interested party, and filed his protest as such and not as *amicus curia*, have been alluded to, we take it for granted that they have not been duly considered, and hence, we ask for a rehearing to the end that the question, as presented by the record, may be duly considered and adjudicated.

It is true that the plea of *res adjudicata* does not set forth all of these record facts, and, it would seem that this plea, and nothing else, with reference to this branch of the cause, received consideration. It was because this plea was not as broad as the facts that we offered in evidence the decisions of the Secretary of the Interior; the summons issued by the Register, and the certificate of cancellation of the entry. (Record, pp. 159-166.) These resords were admissible in evidence, under the general issues, without having been specially pleaded (Southern Pacific Railroad Co. v. United States, 168 U. S., 1; United States v. Bliss, 172 U. S., 321). Besides the objection to them was general and not upon the ground of want of pleading. They were excluded by the trial court not upon the ground that they had not been properly pleaded, but upon the ground that they were wholly inadmissible for any purpose; and

this view was affirmed by the Supreme Court, which said:

"Numerous errors are assigned on the rulings of the trial court with respect to the admissibility of evidence, some of which are new and important. On the trial, appellant offered in evidence the decisions of the department of the interior rendered in the matter of the protest against the former application of appellees for patent on the Ophir lode, together with a notice directed to them, that a hearing had been ordered upon such protest. Each of these was excluded. These decisions were rendered in the proceedings mentioned in the plea of *res judicata*, to which reference has already been made. The principal contention between the parties was, upon which of the conflicting lode claims was a discovery of mineral first made? The department, in the protest proceedings, found from the evidence submitted, that no discovery of mineral had been made upon the Ophir on the 11th day of October, 1893. Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date. A sufficient answer to this proposition should be that as the judgment rendered in the protest proceedings was not *res judicata* between the parties to this action, that no fact found by the department in those proceedings would be competent to contradict or establish any fact directly in issue in this. A consideration of the nature of an application for patent to mineral lands which is rejected, and the result of the judgment of the department of the interior which merely holds that the applicant is not entitled to patent, and where the rights of others to the lands embraced in the application are not determined, will demonstrate that no finding of fact made by the department in such case is either conclusive or admissible in evidence in another action, in which

the appellant bases no rights to the ground in controversy by virtue of such proceedings. Under the law regulating the issuance of patents to mineral lands, and the rules of the department, certain facts must be established. If not, the application is dismissed. Such a judgment is, in effect, one of nonsuit, and therefore not one upon the merits. *Iles* v. *D. & R. G. Ry. Co., 25 Colo., 19.*

It is no more than a conclusion, that in that particular application the applicant has failed to establish the necessary facts to entitle him to a patent the same as a judgment of nonsuit would be directed in an action at law, where the plaintiff had failed to establish the facts upon which he relied to entitle him to the judgment demanded. The fact that a protest had been filed does not change the rule, when, as in this case, the rights of the protestants were neither involved nor adjudicated. Many authorities are cited by counsel for appellant, in which it has been held that the findings of fact made by the department of the interior are conclusive upon the courts. In all these cases the question involved was the authority of the courts to redetermine questions of fact already determined by the department, where parties either based their rights upon a muniment of title issued by the government, which had been annulled, or were attempting to show that the facts upon which a patent had been issued were different from those necessarily established before the department upon which it based its action. This is not the case at bar. Appellees are not asserting any rights to the premises in dispute by virtue of the cancelled receiver's receipt, by attempting to show that the findings of the department, that no discovery of mineral had been made upon the Ophir at the time of their former application, were not justified, but have instituted another proceeding to procure patent, which may be likened to a new action after having suffered judgment of nonsuit; and hence, the authorities cited are not in point.

Our attention has not been directed to any case where the question here involved has been directly decided, but we think the rulings of the department of the interior fully sustain our conclusion, that the cancellation of a mineral entry only is not *res judicata* on another application for patent, and that the facts found, upon which such action is based, are not admissible to support an adverse claim against a second application for the same premises. In *Branagan* v. *Dulaney*, 2 L. D., 744, Secretary Teller, in speaking of the rights of the locator of a mining claim says:

"The government gives the possessor of a lode his choice, to hold it without patent, or to take a patent. If he attempts to take a patent, and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he chooses so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith."

In the case of the *Clipper Mining Company*, reported in 22 L. D., 527, it appears that certain parties applied for a patent on a placer claim, against which a protest was filed, upon the theory that the land embraced in the application was not a placer. This protest was sustained, the department finding, as a matter of fact, that the ground was not subject to location as a placer mining claim. Afterwards, lode claims were located within the limits of the placer, upon which applications for patent were made. The owners of the placer filed an adverse claim against the issuance of patent to the lode claims, in which they set up their old placer title; the applicants moved to dismiss, because a judgment had already been rendered by the land department, that the ground claimed as a placer could not be held as such, and the department re-

fused to dismiss the adverse of the placer claimants, which was affirmed by the secretary of the interior. While the judgment of the latter seems to have been based largely upon the proposition that the adverse claim ousted the department of jurisdiction, the secretary, in his opinion, said:

"It is contended by counsel for applicant that the judgment in the Searl placer was a complete and final adjudication; that the land embraced therein was not placer ground, and could not be entered as such; hence, the adverse claim filed by Searl *et al.*, based, as it is, upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issue, notwithstanding. * * * The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent; the department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it."

In the case of *McGowan et al. v. The Alps Cons. M. Co.*, 23 L. D., 113, the secretary of the interior, in speaking of the effect of the cancellation of a mineral entry, said:

"The fact that the entry was cancelled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right, so long as there was a compliance with the requirements of the law."

The fair inference from these rulings is, that the judgment of the department, rejecting an application for patent and nothing more, leaves the applicants with the same rights as though no application had ever been made."

By offering these records in evidence we made a direct claim of title, right, privilege and immunity under the laws and authority of the United States. As we have stated, these records made a case much broader and more complete than the plea of *res adjudicata*. They, together with our original complaint and other evidence in the case, showed conclusively that plaintiff in error appeared, and was treated as, and accorded the rights of a party. The local land officers found that the applicant had made a valid discovery and dismissed the protest. If this decision had stood, a patent would have issued. If a patent had issued, protestant could never have asserted any further right to his claim. This court is entirely wrong in saying that protestant would not have been bound by the decision.

After the local officers had decided against his protest, the protestant took an appeal to the Commissioner. His claim was lost unless he could reverse the decision of the local land officers. In taking this appeal, was he acting only the part of the "good citizen," or was he trying to save his claim by reversing the finding and judgment against him? *What is the fair and just inference?* The pleadings and the evidence in the case show that he had a conflicting claim that was wholly dependent upon the result of his appeal. To suppose that he was acting the *disinterested part* of a good citizen, and not in his own interest, under the circumstances, is against all reason and experience.

These records show that the protestants had been summoned to assume *the duties and burdens*

of a party litigant. Undoubtedly the evidence in the cause must have shown the existence of his conflicting claim. An appeal was allowed. *He was thus recognized as a party.* Every presumption is made in favor of the regularity of the proceedings in the department, and, under its uniform rulings, an appeal is not allowed to any one but an interested party. For decisions upon this question we refer to our former briefs. We can see no reason to doubt but that the offering in evidence of this Federal decision raised a Federal question, which question was *actually decided* adversely to plaintiff in error. We submit that the record, including the records offered in evidence, shows conclusively that plaintiff in error was a party to these protest proceedings, and bound by their result. If so, any distinct issue of fact, expressly found and adjudicated by the department, can not be redetermined by the courts, in any action between the same parties.

II.

The determination of the court with regard to jurisdiction is wholly irreconcilable with a long line of its former decisions. All of the questions which we presented to this court as Federal questions *were actually decided by the State Court.* These questions were in their very nature, *inherently Federal.*

In Equitable Life Assurance Society v. Brown, decided December 1, 1902, this court said: "The power, however, to dismiss because of the want of substantiality in the claim upon which the as-

sertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy is *per se and inherently Federal.*"

In Home for Incurables v. City of New York, decided December 1, 1902, this court, after stating the effect of some of its former rulings, said: "Later cases in this court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question."

In Missouri, Kansas & Texas Railway Co. v. Elliott, 184 U. S., 530, this court said: "All that is essential is that the Federal questions must be presented in the State court in such a manner as to bring them to the attention of that tribunal. Chicago B. & Q. R. Co. v. Chicago, 166 U. S., 226. And of course where it is shown by the record that the State court considered and decided the Federal question, the purpose of the statute is subserved. And so controling as to the existence of the Federal question is the fact that it was actually considered and decided by the State court, that it has been held, although the general rule is that the raising of a Federal question in a petition for a rehearing in the highest court of the State is too late, yet when the question is thus raised, and it is actually considered and decided by the State court, the right to review exists. Mellett v. North Carolina, 181 U. S., 589."

In F. G. Oxley Stave Co. v. County of Butler, 166 U. S., 648, this court said: "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained."

A question raised in the Supreme Court of a State, and there decided, not on the ground that it was not raised in the lower court, but on its merits, is not raised too late for the purpose of review on writ of error from the Supreme Court of the United States. (Sully v. American National Bank, 178 U. S., 289.)

In the opinion of the court in the case at bar, the court says: "And in the opinion of the Supreme Court, outside of the matters of estoppel and *res adjudicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the Constitution or laws of the United States. * * * Very likely the Constitution and the effect of Federal Statutes were, in a general way, discussed and considered, but nowhere do we find that special setting up or claiming a Federal right which justifies us in taking jurisdiction."

Does this court intend, by the above quotation, to overrule the long line of decisions from which we have quoted, holding that where a Federal question *is actually decided*, it will be reviewed? If so, this aught to be *done in express terms*. We are content to abide by the law as declared by this court and generally enforced; but, if our case falls

within a line of its former decisions, we are not content to be proscribed and denied the benefit thereof. It has not heretofore been understood that King Caprice has any rule in this court. If, therefore, we can demonstrate that the court below has adjudicated Federal questions, to which this court has made no allusion, (notwithstanding their full presentation) we shall submit that we are entitled to a rehearing, and to have this court assume jurisdiction to review the same.

Upon the claim of plaintiff in error there were three shafts, all sunk in 1894, numbered respectively 1, 2 and 3. No. 1 was the discovery shaft. After showing a well defined crevice in shaft No. 1 we were proceeding to prove that there was a mineral bearing vein in shafts No. 2 and 3. We had already introduced undisputed evidence of that fact, and were engaged in strengthening the same (not knowing but that it would be a disputed point) when Mr. Thomas said: "I will say now that we will not offer any testimony to the effect that there is not any vein in shafts number 2 and 3" (Record, p. 50). While we did not, in offering this evidence, expressly mention that it was offered in support of any right, title, privilege or immunity claimed under an Act of Congress, it is perfectly plain that it was done with the view of taking advantage of the Act of Congress which allows the discovery of a vein to be made anywhere within the limits of the claim (R. S., § 2320). In order to further assert this claim, we asked instructions 1 and 10, which the court refused; and in order to emphasize this refusal the court gave instruction

21, which *denied us any benefit from any discoveries in* shafts No. 2 and 3. In asking these instructions we did not, in express terms, predicate the request upon the Act of Congress, although, in instruction 1, we *used the exact language of the act.* In our motion for a new trial we claimed that error was committed in the giving and refusing of these instructions (Record, p. 414). And error was assigned thereon in the Supreme Court (Record, p. 459). In introducing evidence, asking instructions, objecting and excepting to instructions, making a motion for a new trial and assigning error, it is not customary to set forth *specific claims in regard to the law.* The law of a case is presented in the form of briefs and arguments. By the proceedings above noted a solid foundation was laid for asserting a title, right, privilege and immunity, under the Act of Congress allowing a discovery to be made anywhere within the limits of a claim, by virtue of the established and admitted discoveries made in shafts No. 2 and 3. Did we specially set up and claim such title, right, privilege or immunity in the Supreme Court? The decision of that court shows that we did. The court quotes one paragraph from our original brief and three paragraphs from our reply brief in support of our petition for a rehearing. In every one of these paragraphs there is an express appeal to an Act of Congress. No particular act, and no particular section of the Revised Statutes is mentioned, but the subject matter under discussion leaves no room to doubt that we were appealing to that provision which allows a location to be made upon the dis-

covery of a vein within the limits of the claim. The court says:

"Counsel for appellant contend that under instructions given and refused, the jury was precluded from considering the admitted fact, that veins were exposed in two different shafts upon the Tecumseh, designated 2 and 3. What we said in the original main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based, was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is, that if a well defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim, which disclose the mineral necessary to constitute technical veins.

No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there may be no mistake as to the position of counsel on this subject, we quote from their original brief, as follows:

"* * * If the discovery shaft contains a well defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his discovery of the mineral necessary to constitute technical veins. The State Statute does not provide what the well defined crevice shall contain, while the Act of Congress makes no provision as to what shaft the vein required shall be in. Reading and applying the two statutes together, we submit that the well defined crevice must be in the discovery shaft, and the mineral bearing vein may be found in some other shaft upon the claim."

And also from their reply brief, in support of their petition for a rehearing, the following:

"We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well defined crevice (as required by the state statute) and the discovery of a vein (as required by the act of congress is *wholly dependent* upon the discovery shaft. * * *

"We have not questioned the validity of our State statute. It is not necessarily, when properly construed, in conflict with the act of congress. Both the state statute and the act of congress can be given effect, and they should be so construed as to accomplish this." * * *

"We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that when the state, statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of congress.'

The statute of this state, which designates what shall be disclosed in the discovery shaft, provides that it shall disclose a well defined crevice at the depth of at least ten feet from the lowest part of the rim of such shaft at the surface. Sec. 3152, Mills' Ann. Stats. It being conceded that the laws of this state relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the state statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant cannot be upheld, unless the state statute is declared invalid, and the admission upon their part that it is not,

relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh.

'Crevice,' as employed in the statute relative to a discovery shaft, clearly means a mineral bearing vein. It was so held by this court in Bryan v. McCaig, 10 Colo., 309. The Circuit Court of the United States for the district of Colorado has adopted the same view. Van Zandt v. Argentine Co., 8 Fed. Rep., 725; Terrible Co. v. Argentine Co., 98 Fed. Rep., 583; Cheesman v. Shreeve, 40 Fed Rep., 787.

Under these decisions, coupled with the admitted legality of the state statute, the fact that discoveries were made in shafts 2 and 3, upon which no locations were made, does not in any manner affect the validity of the Tecumseh."

As we have already seen we made a distinct claim based upon shafts 2 and 3 all through the trial. We did this by introducing evidence that these shafts contained mineral bearing veins; by asking instructions 1 and 10, which were refused, and by objecting to instruction 21, which was given. By giving and refusing these instructions the trial court announced the broad proposition that a mining claim must stand or fall by what is shown in the discovery shaft, and, by affirming the judgment, the Supreme Court sustained this ruling.

It is perfectly plain that we claimed title, right, privilege and immunity, under an Act of Congress, by virtue of shafts 2 and 2. No one can read the quotation made by the court from our original brief without seeing that we were specially setting up and claiming, under an Act of Congress, that a discovery of mineral bearing veins in shafts 2 and 3 validated our claim, irrespective of whether

we had such vein in the discovery shaft. This claim was denied. The effect of the decision is to nullify the Act of Congress allowing a discovery to be made anywhere within the limits of the claim.

It is true that the court below placed their decision partially on the alleged ground that we conceded the validity of the state statute. We did this only upon the condition that it should be construed so as to require only a well defined crevice in the discovery shaft, and to give full credit to veins elsewhere discovered within the limits of the claim. This attempt to reconcile the two statutes was made a pretext for a general assertion that we unconditionally admitted the validity of the state statute. Any one can see, even from the garbled extracts which the court made from our briefs, that this assertion *is without any foundation in truth.* Our intention was that the state statute did not, when properly construed, require a vein to be disclosed in the discovery shaft, and that, to construe it as making such requirement would bring it into conflict with the Act of Cougress. The record shows that during the entire progress of this cause we were making a claim ofright by virtue of discoveries in shafts 2 and 3. All of this is utterly inconsistent with any general admission of the validity of the state statute as now construed. Under that construction the vein must be discovered in the discovery shaft, notwithstanding the Act of Congress declares that it may be anywhere within the limits of the claim.

In our complaint we claimed the right of possession by virtue of compliance with the laws of

the United States. An Act of Congress provides that before a claim shall be located a vein shall be discovered within the limits of the claim. To prove a compliance with this law we showed that we had made three discoveries of what we claimed were veins. Two of these discoveries were admitted; but the trial court held that we could take no benefit from these discoveries, because they were not in the discovery shaft. We excepted to this view and set up the claim, especially and specifically in the Supreme Court, that we were entitled to go outside of the discovery shaft to find the vein required by the Act of Congress. This claim was denied. The question thus raised and actually adjudicated was "*per se and inherently*" a Federal question. The effect of the decision was to sustain the trial court in excluding from all consideration discoveries made in shafts 2 and 3, and to plainly violate the Act of Congress. Here, then, we have the *actual decision of a Federal question.* This court has the jurisdiction to review this question, irrespective of whether a right, title, privilege or immunity was specially set up and claimed or not. The fair and conclusive presumption is that such right was specially set up or the question would not have been determined.

Where a question is *inherently Federal,* it makes no difference whether the state court understood it to be of this nature or not. A declaration of the state court that no Federal question was involved, would go for nothing. Neither can the state court divest this court of jurisdiction by putting its decision on false and fictitious grounds. If

in substance and in truth, a right, title, privilege or immunity is claimed, that depends for its existence and measure upon Federal law, and the same *is actually* denied, a Federal question *is actually decided.*

Now, when all quibbles and subterfuges, such as were indulged by the court, are laid aside, it is as plain as the sun at noonday that from beginning to end, we tried this case upon the theory that we had a right and title based upon having made a discovery in shafts 2 and 3. As neither of these shafts was the discovery shaft, we could not have been making any claim under the state statute. While we did not, in the earlier stages of the case, mention the fact that we were claiming under the Act of Congress, the subject-matter, *in its inherent nature*, demonstrated this fact. But when we reached the Supreme Court the claim of right and title was specifically predicated upon the Act of Congress.

We do not know what we can add tending to convince the court that there has been a terrible miscarriage of justice in this court in this cause. We can do no more than to restate the course of procedure as shown by the record. We asserted right and title by virtue of shafts 2 and 3. (1) By introducing evidence of such discoveries of veins. (2) By asking instructions 1 and 10, which were refused, and by excepting to such ruling. (3) By objecting and excepting to instruction 21 given by the trial court. (4) By assigning error upon these rulings in giving and refusing these instructions in our motion for a new trial. (5) By as-

signing error on these same rulings in our assignment of errors in the Supreme Court. (6) By presenting a brief in the Supreme Court distinctly claiming that these rulings were violative of the Act of Congress allowing a mining claim to be located upon the discovery of a vein anywhere within the limits of the claim. Every one of the above acts distinctly points to a claim of right and title under the Act of Congress, for the state statute deals only with a discovery in the discovery shaft. The merest tyro in the law would know that every one of these acts was done and performed on the faith of the Act of Congress. There is no other law under which to make any such claim. To suppose that the trial court or the Supreme Court did not know that such claim was predicted upon Federal law is to presume absolute ignorance, on the part of such courts, as to the statutory law applicable to the case on trial. But when we came to the Supreme Court we based our claim specifically on the Act of Congress. And, finally, the Supreme Court denied the claim of title and right which we had made by virtue of these two established and admitted discoveries of veins which we had made outside of the discovery shaft, and within the limits of the claim. By the affirmance of the judgment of the trial court the Supreme Court sustained the rulings refusing instructions 1 and 10 asked by us and giving instruction 21. Instruction 21 declared that the entire "*right and extent of the lode mining location must be measured by and from such discovery shaft.*" By this instruction the trial court denied all right and

title that we were claiming by virtue of two admitted discoveries outside of the discovery shaft; and, by affirming the judgment, the Supreme Court reiterated such denial. The court thereby passed upon a question that was *per se and inherently Federal.* The opinion of the court below shows distinctly upon its face that it knew that it was denying a title and right claimed under an Act of Congress.

This court intimates that we did not raise this question or make this claim of right and title under an Act of Congress, or assert the inconsistency of the state statute with the Act of Congress until after the affirmance of the judgment. By this we understand that the court is suggesting that we were too late in raising these questions. To this we interpose two decisive answers. 1. The opinion of the Supreme Court shows that we raised these questions *in our original brief.* 2. The questions being *actually decided* it is immaterial *when* we raised them, or whether we raised them at all.

If, under this Act of Congress, the making of these two admitted discoveries of veins outside of the discovery shaft, gives the plaintiff in error a right and title to the Tecumseh mining claim (all other questions being resolved in his favor) then justice demands that the rulings by which he was denied such right and title should be reversed, and we submit that such right and title, being expressly denied, and actually adjudicated adversely to plaintiff in error, it becomes the duty of this court

to exercise its jurisdiction to correct the error committed by the denial of such right and title.

Other Federal questions which were *actually decided* by the court below relate to the claim of right and title asserted by plaintiff in error by reason of defendants in error not having performed annual labor, as required by Act of Congress for the year 1897. As to this question the Supreme Court said:

"It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir, on account of the assessment work for 1897, a distance of seven or eight feet; that this drift was worth $12 per foot. For this labor appellee appears to have paid the sum of $90. For additional work he paid for two days' work at the rate of $4 per day, and later, for further work, $18. This, in addition to paying for the powder, fuse, steel and candles that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine, and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the court, by instruction No. 24, directed the jury as follows: 'Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon, is on the plaintiff, and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you

are to determine that question in favor of the defendants.'

The objection urged to this instruction is, that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which appellant can base any claim. The Act of Congress (Sec. 2324, Rev. Stat. U. S.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is, that as between the locator and the general government, the failure to do the annual assessment work does not result in a forfeiture. In other words, it is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a *prima facie* case is made on the part of the original locator by showing a valid lacation. Hammer v. Garfield M. Co., 130 U. S., 291.

To otherwise express our views, it might be said, that after a valid location, the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. Renshaw v. Switzer, 15 Mining Reporter, 345; 6 Mon., 464; 13 Pac. Rep., 127.

It is the location by the new claimant, and not the mere lapse of time which determines the right of the original locator. Little Gunnell G. M. Co. v. Kimber, 1 Morrison's Mining Reports, 536.

So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as

the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not, in fact, performed. Hall v. Kearny, 18 Colo., 505; Johnson v. Young, 18 Colo., 625; Hammer v. Garfield M. Co., *Supra*."

The court below, in the above quotation, first determines a question of fact. As this determination relates to a Federal question, this court will not be bound by it if it was reached only by a *falsification of the record*, and is *not sustained by any evidence in the record*. Upon this question we refer to our former brief (pp. 107-137). The statement of Cone that he paid more than $100 for the annual labor of 1897 might, if it stood entirely alone, give rise to a *vague presumption* that it was of the *actual value* of $100. But when he testifies that he *knew nothing* about the *actual value* of the work, and other witnesses testify positively that it was of no greater value than $64, and no witness makes its value $100, such presumption can not be used to give rise to a *conflict of evidence*. The presumption, if any before existed, ceases to be evidence, or, rather, can not be *weighed as against positive evidence*.

The court then proceeds to hold that the burden of proof was upon us to show that they had not performed this annual labor. This was a plain violation of the Act of Congress of March 3, 1881, providing that if, in an adverse suit, title to the ground shall not be established by either party,

the jury shall so find, and judgment shall be entered accordingly, and the claimant shall not be entitled to a patent. (Brief, p. 100.)

But the court after erroneously finding that the $100 worth of labor was performed, and then declaring that the burden of proof was upon us to show that it was not performed, proceeded to declare that it was wholly immaterial *whether it was performed or not.* The court, in express terms, construes Sec. 2324, Rev. Stat., U. S., as allowing a mining claim to be patented, and allowing a *verdict and judgment in an adverse suit,* to go in favor of a locator who has never performed any annual labor *after making his original location.* Here then is an *actual decision of a Federal question;* an actual construction of an Act of Congress; an actual denial of a right, title, privilege and immunity flowing from a different construction of the act.

The subject of annual labor is regulated solely by Act of Congress. There is no State statute upon the subject. This court takes judicial notice of the statutes of the States. All questions in regard to annual labor are *necessarily and inherently Federal.* The provision of the Act of Congress, referred to and construed by the court below, declares: "*On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year.*" How, in the name of reason, can this court say that the construction of this act does not give rise to a Federal question? If it

is a Federal question, then it is one *actually decided*, and this brings the case within the line of the decisions of this court from which we have quoted.

We claimed a right, title, privilege and immunity not to have a verdict and judgment go in this case in favor of defendants in error because they had failed to perform their annual labor for 1897. We supported this claim by introducing evidence showing that they had not performed this labor. Of course we were claiming that, under the Act of Congress, they must, before they could secure a verdict and judgment entitling them, without further showing, to a patent, show that they had performed their annual labor at least for the past year. We were finally met by the Supreme Court with a construction of the Act of Congress which entirely dispenses with the necessity for such labor to be performed. Here is, then, a plain Federal question, actually raised and actually decided; and that gives jurisdiction to this court to review the decision upon such question.

We do not understand that it is a matter of *discretion* as to whether this court will review the decisions of state courts as to Federal questions properly raised. If we did so understand, we should try and present some considerations, addressed to such discretion, as to why *truth and justice* demands that this court should assume jurisdiction of this cause. With this view we shall go no further than to declare our confidence that, under the law of the land, we have an *absolute right* to have a rehearing, to the end that, at least,

such Federal questions as were passed upon by the court below, shall be properly reviewed by this court.

H. B. JOHNSON,

Attorney for Plaintiff in Error.

Supreme Court
FILED
DEC 3 1902
JAMES H. McKENNEY,
Clerk

No. 84.

Cd. by Thomas for D. C.

Filed Dec. 3, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 84.

JOSEPH H. BEALS, PLAINTIFF IN ERROR,

v.

JAMES J. CONE ET AL.

CITATION OF ADDITIONAL AUTHORITIES FOR DEFENDANTS IN ERROR.

CHARLES S. THOMAS,
Counsel for Defendants in Error.

(18,122.)

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CITATION OF ADDITIONAL AUTHORITIES FOR DEFENDANTS IN ERROR.

To the Honorable the Judges of said Court:

I desire, in addition to the briefs heretofore filed on motion to dismiss and on final hearing, to cite your honors to the following Land Department decisions bearing upon the alleged errors assigned to the judgment of the supreme court of the State of Colorado:

"*It would appear that questions growing out of rival and adverse claimants to the right of possession of mineral lands belong in a special sense to courts of competent jurisdiction to try and determine.* It is apparent from the language of the statute that a court is not bound to award all the land in conflict to one party, but may in proper cases of which it is to be the judge, award

portions of land to different claimants. The conclusive and binding force of such judgment as to matters which by statute are exclusively within the jurisdiction of the courts have been frequently recognized by the Department both in early and recent decisions, as in Silver King lode, 14 L. D., 308; Newman *v.* Barnes, 23 L. D., 257; Stranger lode, L. D., 320. The courts of competent jurisdiction are the tribunal under § 2326 of the Revised Statutes into which adverse claimants of mining lands are invited for the settlement of their conflicting rights."

In re Barney *v.* Conway, 29 L. D., 390.

See also case of Stranger lode.

A copy of this statement has been mailed to counsel for plaintiff in error.

Very respectfully,

CHARLES S. THOMAS,
Attorney for Defendants in Error.

[Endorsed:] No. 84. In the Supreme Court of the United States. Joseph H. Beals, plaintiff, *v.* James J. Cone *et al.*, defendants. Citation of authorities. Thomas, Bryant & Lee, attorneys for defendants in error, 621–627 Ernest and Cranmer building, Denver, Colorado.